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In the
Supreme Court of the United States
October Term, 2002

ESTATE of SHANE G. SORRELLS, By and Through Its Independent Executrix, Sheryl Thostenson, Dana Fontenot, as Next Friend of CHANDLER SORRELLS, a Minor, PAT SORRELLS, and RITA SORRELLS,
Petitioners,

vs.

CITY of DALLAS, JOSEPH CUTRONA, WILLIAM READDY, and STANLEY GRIFFIS,
Respondents.

On Petition For a Writ Of Certiorari To The United States Court of Appeals for the Fifth Circuit

SUPPLEMENTAL APPENDIX

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SUPPLEMENTAL APPENDIX EXHIBIT "A"

FINDINGS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

Defendants City of Dallas, Joseph Cutrona, William Readdy, Stanley Griffis, Richard Hunt, Thomas Moore, Arnaldo Rivera, Bennie Click, Roland Gamez, and Joseph Vasquez have filed a motion for summary judgment in this civil rights case. The motion has been referred to United States Magistrate Judge Jeff Kaplan for recommendation pursuant to 28 U.S.C. § 636(b).

I.

The facts of this case are set forth at length in *Sorrells v. City of Dallas*, 192 F.R.D. 203, 204-06 (N.D. Tex. 2000). Succinctly stated, Dallas police officers were dispatched to an apartment complex to investigate a report of indecent exposure on September 17, 1998. Upon their arrival, the officers witnessed a nude male masturbating in the front seat of his car. The suspect, later identified as Shane G. Sorrells, did not respond when told to exit his vehicle. At that point, the officers decided to use pepper mace to force Sorrells out of his car. Sorrells appeared unaffected by the spray. The situation escalated when the officers forcibly removed Sorrells from the car and attempted to handcuff him. According to plaintiffs, one or more officers struck Sorrells repeatedly with a baton, kicked him, and maintained a chokehold for "five to eight minutes after he collapsed to the ground." Sorrells eventually lost consciousness and stopped breathing. Paramedics transported him to the hospital where he was pronounced dead.

The Sorrells family now sues various police officers, paramedics, supervisory officials, and the City of Dallas for civil rights violations under 42 U.S.C. §§ 1983 & 1985. They also assert state law claims for assault, battery, false imprisonment, intentional infliction of emotional distress, and negligence. Defendants move for summary judgment as

to all claims and causes of action. The issues have been briefed by the parties and the motion is ripe for determination.

II.

Summary judgment is proper when there is not geninue issue as to material fact and the movant is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L.Ed.2d (1986). A dispute is "genuine" if the issue could be resolved in favor of either party. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 1356, 89 L.Ed.2d 538 (1986); *Thurman v. Sears, Roebuck & Co.*, 952 F.2d 128, 131 (5th Cir.), *cert. denied,* 113 S. Ct. 136 (1992). A fact is "material" if it might reasonably affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L.Ed.2d 202 (1986); *Matter of Gleasman,* 933 F.2d 1277, 1281 (5th Cir. 1991).

A movant who does not have the burden of proof at trial must point to the absence of a genuine fact issue. *Duffy v. Leading Edge Products, Inc.*, 44 F.3d 308, 312 (5th Cir. 1995); *Tubacex, Inc. v. M/V Risan*, 45 F.3d 951, 954 (5th Cir. 1995). The burden then shifts to the non-movant to show that summary judgment is not proper. *Duckett v. City of Cedar Park*, 950 F.2d 272, 276 (5th Cir. 1992). The non-movant may satisfy this burden by tendering depositions, affidavits, and other competent evidence. *Topalian v. Ehrman*, 954 F.2d 1125, 1131 (5th Cir.), *cert. denied*, 113 S.Ct. 82 (1992). All evidence must be viewed in the light most favorable to the party opposing the motion. *Rosado v. Deters*, 5 F.3d 119, 122 (5th Cir. 1993); *Reid v. State Farm Mutual Automobile Insurance Co.*, 784 F.2d 578 (5th Cir. 1986). However, conclusory statements and testimony based on conjecture or subjective belief are not competent summary judgment evidence. *Topalian,* 945 F.2d at 1131.

III.

Defendants seek summary judgment on five grounds: (1) plaintiffs cannot establish their federal constitutional claims for use of excessive force, failure to intervene, failure to render aid, conspiracy, and denial of due process and equal protection; (2) the individual defendants are entitled to qualified immunity; (3) there is no basis for municipal liability against the City of Dallas; (4) the police and fire chiefs are not liable for the actions of their subordinates; and (5) defendants are immune from plaintiffs' state law claims.[1] The Court will consider these issues in turn.

IV.

The gravamen of plaintiffs' complaint is that various police officers used excessive force against Shane G. Sorrells. Plaintiffs also assert claims under federal law for failure to intervene, failure to render aid, conspiracy, and denial of due process and equal protection.

A.

An excessive force claim is analyzed under the "reasonableness" standard of the Fourth Amendment to the United States Constitution. *Graham v. Connor*, 490 U.S. 386, 395, 109 S. Ct. 1865, 1871, 104 L.Ed.2 443 (1989); *Ikerd v. Blair*, 101 F.3d 430, 433 (5th Cir. 1996). The Fifth Circuit has established a three-part test in such cases. A plaintiff must show that: (1) he suffered a significant injury; (2) resulting from force that was clearly excessive to the need for force; and (3) the force used was objectively unreasonable. *Goodson v. City of Corpus Christi,* 202 F.3d 730, 740 (5th Cir. 2000). The Court must view the totality of

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[1] Defendants also seek summary judgment on the grounds that the Dallas Police Department and Dallas Fire Department are not entities capable of being sued and that the City of Dallas is not liable for punitive damages. In their response, plaintiffs point out that they have not sued the Dallas Police Department or Dallas Fire Department. (Plf. Brief at 22 n. 21). The Court does not reach the issue of punitive damages because plaintiffs have failed to establish any of their claims against the City.

circumstances from the standpoint of a reasonable officer on the scene, paying particular attention to "whether the suspect pose[d] an immediate threat to the safety of the officers or others." *Stroik v. Ponseti,* 35 F.3d 155, 157-58 (5th Cir. 1994), *cert. denied,* 115 S. Ct. 1692 (1995), *citing Graham,* 109 S.Ct. at 1872.

The following facts are not in dispute. On September 17, 1998, Shane G. Sorrells parked his car behind an apartment complex at 3910 North Hall Street in Dallas, Texas. Sorrells isolated himself in the vehicle by locking the doors and rolling up the windows. Corporal Joseph Cutrona and Officer William Readdy were dispatched to the scene to investigate a report of indecent exposure. Upon their arrival, the officers observed Sorrells masturbating in the front seat of his car. The officers instructed Sorrells to exit the vehicle. Sorrells ignored their command and continued masturbating. The officers then called for backup. Before help arrived, Corporal Cutrona shot Oleoresin Capsicum ("OC") spray into the car.[2] Shortly thereafter, Sergeant Stanley Griffis arrived at the location. Sergeant Griffis borrowed an ASP baton from Officer Readdy and broke out the passenger side window of the car. Sorrells was cut by pieces of flying glass and began to bleed. Corporal Cutrona and Sergeant Griffis then used more OC spray on Sorrells, but he still refused to exit the vehicle. At that point, Corporal Cutrona unlocked the doors and attempted to pull Sorrells from the car. However, Sorrells was so slippery from sweat, blood, and OC spray that the officer could not get a firm grasp on his wrist. Corporal Cutrona and Officer Readdy were eventually able to remove Sorrells from the car and get him to the ground.

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[2] Oleoresin Capsicum spray, also known as pepper spray or pepper mace, is a chemical agent made from hot pepper extracts. The active ingredient, capsicum, is an inflammatory agent. Exposure to OC spray irritates the mucous membranes of the eyes, nose, throat, and lungs. It also causes dilation of the capillaries, which inhibits the ability to breathe.

A struggle ensued when the officers tried to handcuff the suspect. Sorrells resisted and attempted to leave the scene. Officer Readdy caught Sorrells after a brief chase and brought him down by using a Lateral Vascular Neck Restraint ("LVNR") hold. [3] Other officers stuck Sorrells with their batons in an attempt to bring him under control. At some point during this ordeal, Sorrells lost consciousness and stopped breathing. Paramedics administered CPR on the scene and transported Sorrells to Parkland Memorial Hospital. Despite efforts to revive him, Sorrells was pronounced dead on arrival. An autopsy revealed that Sorrells sustained a fractured larynx. The coroner initially ruled his death a homicide.

Defendants contend that their actions were objectively reasonable under the circumstances and therefore did not rise to the level of excessive force. In an affidavit prepared immediately following the incident, Sergeant Griffis stated that he decided to break out the car window and arrest Sorrells because "[w]ith the car running, I felt that the suspect could possibly put the car in gear. If he did that, he would have endangered himself, us, and any citizen in his path." (Plf. App. at 189). Sergeant Griffis did not consider covering the windshield with a blanket and "simply waiting [the suspect] out" because Sorrells might have had a weapon in the car. (*Id.* at 226).

Defendants also attempt to justify striking Sorrells with their batons and placing him in a neck hold. Sergeant Griffis stated that the suspect continued to masturbate even

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[3] A Lateral Vascular Neck Restraint, or LVNR hold, is one method used by police officers to restrain a resisting suspect. The three levels of LVNR that may be employed are: (1) a rear headlock; (2) compression until compliance is achieved; and (3) compression until the suspect is unconscious. DPD SPECIAL ORDER 97-05, § 903.01 (1997). An LVNR hold is considered safer than a bar-arm hold because it restricts only flow to the brain rather than the suspect's ability to breathe. (Plf. App. At 146, 184-85, 277-78).

after he was forcibly removed from the vehicle. Corporal Cutrona and Officer Readdy were unable to get control of the suspect, who was covered with OC spray and blood. Sergeant Griffis described Sorrells as "super strong, as if high on something." (*Id.* at 201). After Sorrells refused to comply with repeated verbal commands, Corporal Cutrona began striking him on the elbows and legs with an ASP baton. Sorrells was unfazed by the blows and continued to resist. (*Id.*)[4] He eventually jumped to his feet, spit in Corporal Cutrona's face, and ran away. (Def. App. at 5, 11, 17). Sorrells ran into an apartment complex between two parked cars. (*Id.* at 12). When confronted by the officers, Sorrells "continued to aggressively run at us and thrash his arms towards us." (*Id.* at 17). Corporal Cutrona struck Sorrells on the leg with his baton, but he continued to ignore orders to place his hands behind his back. Officer Readdy then placed a LVNR hold on the suspect. (*Id.*)

According to defendants, Sorrells continued to struggle after Officer Readdy applied the neck hold. (*Id.* at 12, 17-18, 21, 25). Corporal Cutrona tried to protect himself by striking Sorrells in the leg "several times" with his baton. (*Id.* at 12). He then noticed that "[d]ecedent's eyes start[ed] to close and his face beg[an] to slightly discolor." (*Id.*). Officer Readdy released the hold when Sorrells went to the ground. Still, the officers were unable to get Sorrells on his stomach so they could immobilize his arms. After struggling with the suspect for more than 15 minutes, Corporal Cutrona had almost no energy left. He explained:

> All I could think to do was to get on Decedent's back to prevent him from standing up and continuing to fight us. I got on his back while ordering him to stay on the ground. My right foot was on his right

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[4] According to Corporal Cutrona, Sorrells responded to the blows by stating "[t]hat feels good; f--- me up the a--." (Def. App. at 11).

> shoulder area, near the middle of his back, and my left foot was on his mid-back. I was trying to stand and balance myself, even though I could feel that Decedent was still trying to get up. If he was saying anything our commands drowned it out but he was definitely conscious and still resisting our attempts to handcuff him.

(*Id.* at 12-13). Corporal Cutrona, assisted by Officers Thomas Moore and Richard Hunt, eventually subdued and handcuffed the suspect. (*Id.* at 6, 13, 18, 21, 25). Several officers went to get treatment for their exposure to OC spray. After they left, Officer Hunt noticed that Sorrells had lost consciousness and stopped breathing. (*Id.* at 7, 13, 18, 21, 25, 28).

Plaintiffs have adduced considerable evidence to controvert defendants' version of the facts surrounding this incident. For example, Corporal Cutrona testified in his deposition that Sorrells' car was parked facing the patio of the apartment complex. (Plf. App. at 129). Officer Readdy parked his squad car directly behind Sorrells. (*Id.*) Thus, the officers effectively prevented Sorrells from moving his vehicle. This controverts Sergeant Griffis' contention that immediate action was required to minimize the risk of harm to officers and onlookers if Sorrells put his car in gear. Moreover, there is evidence in the record to suggest that Sorrells was not a threat to anyone. Dallas Police Detective Joe DeCorte admitted as much to members of the Sorrells family. (*Id.* 440-41). It is therefore questionable whether the officers were justified in using OC spray to remove Sorrells from his car. [5]

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[5] Dallas Police Department Special Order No. 97-05 provides, in relevant part, that "OC [s]pray will not be used on subjects who are using techniques of non-cooperation and those not posing a physical threat to anyone." (Plf. App. at 43).

There also is evidence that officers continued to strike and kick Sorrells after he was on the ground. One witness, Susan Oakey, observed an officer strike Sorrells with his baton. Sorrells was "very preoccupied and appeared to be unable to ward off the blows." (*Id.* at 385). Oakey saw the same officer kick Sorrells several times after he rolled over into a fetal position. At no time did Sorrells offer any resistance. (*Id.* at 386). Another witness, Robert Adelsberger, described the ferocity of the blows administered to Sorrells after officers removed him from his car:

> One of the officers who was approximately 6' – 6'1" tall started kicking the man. The other officer who was short, stocky, bald and had a mustache started beating the man with a baton. He was hitting him with side strokes and overhead strokes of the baton. At one point, he was bringing the baton back over his head and coming straight down on the man like he had an "ax handle." The officer hit him repeatedly, maybe 25-30 times, and to the point that the officer was breathing heavily and red in the face.

(*Id.* at 356). Adelsberger further stated that Sorrells, who was completely nude and barefooted, merely "tip-to[ed]" down a parking lot filled with rocks and debris. (*Id.* at 356). Oakey testified that Sorrells "stumble[d] off." (*Id.* at 384). This controverts the officers' testimony that Sorrells attempted to flee the scene. Even Corporal Cutrona conceded that Sorrells was not running at such a fast pace that it was hard to keep up with him. (*Id.* at 143). Officer Readdy described the pace as something less than a sprint. (*Id.* at 182). Sergeant Griffis said that Sorrells "wasn't trying to outrun us, at least in my appearance [sic]." (*Id.* at 230).

Finally, the facts and circumstances surrounding the chokehold used on Sorrells are in dispute. Corporal Cutrona admitted that he cornered the suspect between two cars and a fence. (*Id.* at 104, 123). This effectively negated any risk of flight. While Officer Readdy applied the LVNR hold, Corporal Cutrona continued to hit Sorrells with a baton. (*Id.* at 123). There is at least some evidence that Sorrells was not fighting or struggling with officers at the time. (*Id.* at 382). One witness said that the neck hold applied by Officer Readdy was so forceful that "[t]he officer was literally being carried by [Sorrells] due to the 'choke hold' and the officer's feet being off the ground." (*Id.* at 356). There is sufficient evidence in the record to suggest that these actions might be contrary to police department policy.[6]

Defendants cite *Wagner v. Bay City, Texas*, 227 F.3d 316 (5th Cir. 2000), for the proposition that the conduct of the police officers was not objectively unreasonable as a matter of law. *Wagner* also involved the death of a suspect while in police custody. In that case, the police were called to break up a fight at a fast-food restaurant. The suspect resisted the officers and was sprayed with pepper mace. Next, the officers handcuffed the suspect and placed him face-down on the pavement. There was conflicting evidence as to whether the suspect continued to struggle after that point. In any event, one of the officers placed his knee on the suspect's back and "kept pushing [his] neck and head to the ground" with a stick. Sometime during this ordeal the suspect passed out. Rather than take him to the hospital, the officers decided to transport the suspect to jail. He was carried to a squad car and placed on his stomach with his head turned toward the front of the vehicle. No one monitored his condition. When

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[6] Dallas Police Department Special Order No. 97-05 provides, in relevant part, that "[t]he LVNR will not be used on subjects who are using techniques of non-cooperation and not posing a physical threat to anyone." (Plf. App. at 44). In addition, the LVNR should only be used in "exigent circumstances" if the subject has been sprayed with Oleoresin Capsicum. (*Id.*).

the suspect arrived at the jail, the officers realized that he was not breathing. CPR was administered and the suspect was taken to the hospital where he later died. *Id.* at 318-19.

The district court determined that there were genuine issues of material fact as to whether the amount of force used against the suspect was objectively unreasonable. The Fifth Circuit disagreed. The court concluded that "nothing about the use of chemical spray or even a chokehold was objectively unreasonable conduct where the suspect physically resisted arrest. The officers' actions were all consistent with the idea that they merely were trying to restrain a violent individual." *Id.* at 324, *citing Estate of Phillips v. Milwaukee*, 123 F.3d 586, 593-94 (7th Cir. 1997). Thus, the court held that defendants were entitled to summary judgment on plaintiffs' excessive force claim.

The Court acknowledges *Wagner* but determines that the facts of this case are more analogous to *Gutierrez v. City of San Antonio*, 139 F.3d 441, 445 (5th Cir. 1998). In *Gutierrez*, the police confronted a suspect who appeared to be "high on some type of drugs." The suspect came toward the officers swinging his arms wildly and shouted that he had been shot. Although the suspect had numerous abrasions, no bullet wounds were found. The officers handcuffed the suspect "for his safety and mine." The situation escalated when paramedics attempted to transport the suspect to the hospital. At that point, the suspect began to push and kick one of the paramedics. The officers then decided to "hog-tie" the suspect and transport him in a squad car. It is not clear whether the suspect was placed in a face-down position in the rear seat or with his fact pointed toward the rear of the front seat. In any event, he was conscious and struggling when the officers set off for the hospital. Approximately ten minutes later, the suspect stopped struggling. He was unconscious by the time he arrived at the hospital. Medical personnel could not find a pulse and the suspect was later pronounced dead by an emergency room doctor. *Id.* at 443.

On those facts, the Fifth Circuit held that summary judgment was not proper on plaintiffs' excessive force claim. The court based its decision, in part, on a well-circulated report issued by the San Diego Police Department on the dangers of Sudden Custody Death Syndrome ("SCDS"). That report concluded that SCDS could be caused by the combination of: (1) drug use; (2) positional asphyxia; (3) cocaine psychosis; and (4) hot-tying or carotid choke holds. Because there was conflicting evidence as to whether these conditions existed, the court held that it was impossible to determine whether the officers' actions were objectively reasonable under the circumstances. *Id.* at 446.

Similar considerations preclude summary judgment in favor of Sergeant Griffis, Corporal Cutrona, and Officer Readdy. The evidence shows that at least one officer believed that Sorrells was "high on something." (Plf. App. at 201).[7] He was handcuffed and placed face-down on the ground while Corporal Cutrona stood on his back "to prevent him from standing up. . ." (Def. App. at 12). Although Sorrells was not hog-tied, he was placed in an LVNR or carotid neck hold until his fact turned red. (Plf. App. at 382). Among the factors that contributed to his death were cocaine abuse, restraint, and blunt force injuries. (*Id.* at 94-95). These facts are more akin to *Gutierrez* than *Wagner*. Moreover, there is conflicting evidence regarding the amount of resistance offered by Sorrells and whether he presented a danger to the officers or others. A jury must resolve these conflicts in order to determine whether the level of force used was clearly excessive and objectively unreasonable under the circumstances.[8]

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[7] Toxicology reports confirmed that Sorrells ingested a large amount of cocaine, which also may explain his aberrant behavior. (Plf. App. at 89).

[8] Sergeant Griffis is not insulated from liability merely because he did not personally strike Sorrells with a baton or apply a chokehold. The evidence shows that Sergeant Griffis used an entire canister of OC

The Court reaches a different conclusion with respect to Officers Hunt, Moore, and Rivera. The evidence shows that these officers arrived on the scene after Sorrells had been taken down by Officer Readdy. (*Id.* at 239, 247, 252, 257, 266, 268-70). Although there is conflicting evidence as to the resistance offered by the suspect up to that point, there is no dispute that Sorrells struggled when the officers tried to place handcuffs on him. (*Id.* at 104-5, 110-11, 160, 202, 239, 247, 253, 257, 266, 268-70, 343, 356-57, 360, 371). Moreover, Officers Hunt, Moore, and Rivera merely forced Sorrells onto his stomach so he could be restrained. The use of physical force to secure compliance from a suspect who resists arrest is not objectively unreasonable. *See Sappington v. Bartee,* 195 F. 3d 234, 237 (5th Cir. 1999) (officer justified in using force to arrest uncooperative suspect); *Colston v. Colston*, 130 F.3d 96, 100 (5th Cir. 1997) (use of force objectively reasonable when suspect poses danger to arresting officer). Accordingly, these officers are entitled to summary judgment.

B.

The failure to protect the suspect from the use of excessive force by others may give rise to liability under 42 U.S.C. § 1983. *See Hale v. Townley*, 45 F.3d 914, 919 (5th Cir. 1995); *Harris v. Chancelor,* 537 F.2d 203, 205-06 (5th Cir. 1976). As discussed above, there is sufficient evidence to preclude summary judgment in favor of Sergeant Griffis, Corporal Cutrona, and Officer Readdy as to this claim. All three officers were present when Sorrells was subjected to the use of force. None intervened to protect him. However, Officers Hunt, Moore, and Rivera did not arrive on the scene until after Sorrells had bee sprayed, beaten, kicked, and taken down with an LVNR hold. These officers are entitled to summary judgment as to this claim.

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spray on Sorrells, which hampered his breathing and may have contributed to his death. (Plf. App. at 189, 428-39).

C.

Plaintiffs also contend that the police officers and paramedics failed to render medical aid to Sorrells. This claim is governed by the "deliberate indifference" standard of the Eighth Amendment to the United States Constitution. U.S. CONST. amend. VIII; *Estelle v. Gamble*, 429 U.S. 97, 105, 97 S. Ct. 285, 292, 50 L.Ed.2d 251 (1976). Plaintiffs must show that the police officers were aware of a substantial risk of serious harm and failed to take reasonable measures to abate that risk. *Hare v. City of Corinth*, 74 F.3d 633, 649 (5th Cir. 1996), *citing Farmer v. Brennan*, 511 U.S. 825, 847, 114 S. Ct. 1970, 1984, 128 L.Ed.2d 811 (1994).

The summary judgment evidence shows that two paramedics arrived on the scene at the same time as Officers Hunt and Moore. Before he was handcuffed, Sorrells stated he could not breathe. (Plf. App. at 338, 342, 345). One of the paramedics attributed the comment to his struggle with police officers. (*Id.* at 339). When the other paramedics approached the suspect, Sorrells "cussed" and spit at him. (*Id.* at 242, 281, 346, 349). Corporal Cutrona and Officer Readdy went to the ambulance to receive treatment for their exposure to OC spray. (*Id.* at 105, 111, 158, 170). At that point, Sorrells was still breathing and muttering. (*Id.* at 105, 111, 158, 163, 170). Officer Hunt then yelled that Sorrells had stopped breathing. (*Id.* at 105, 111, 158, 170, 198, 224, 242-43, 249, 340, 346). Prior to that time, Sorrells' color had returned to normal. (*Id.* at 106, 111).

Defendants contend that the paramedics immediately responded to Officer Hunt's outcry and began to administer CPR. (*Id.* at 105, 111, 158, 170, 198, 224, 242-43, 249, 340, 346). Plaintiffs disagree. They claim that one of the paramedics looked at Sorrells but "went back to the ambulance in an unconcerned manner." (Plf. Brief at 19). According to plaintiffs, neither paramedic made physical contact with Sorrells or attempted CPR "until nearly ten minutes after Officer Readdy released the choke-hold and

only when Mr. Sorrells' condition became so severe that his skin turned blue." (*Id.*)

These discrepancies can be easily reconciled. Although Officer Moore did say that one of the paramedics knelt down over Sorrells "but then went back to the ambulance in an unconcerned manner," there is no evidence that Sorrells was in distress at the time. (Plf. App. at 270). To the contrary, the evidence shows that paramedic started CPR within *one minute* after Sorrells went quiet and stopped breathing. (*Id.* at 270, 285). Plaintiffs have failed to adduce any evidence that the police officers and paramedics on the scene failed to render appropriate medical treatment to Sorrells or were deliberately indifferent to his medical needs. Defendants are entitled to summary judgment as to this claim.

D.

Plaintiffs further allege that defendants conspired to deprive Sorrells and his family of their civil rights "[a]s a result of their concerted and malicious treatment of Mr. Sorrells. . ." (Plf. Compl. ¶ 4.07). Defendants correctly point out that such vague and conclusory allegations will not defeat a motion for summary judgment. *See Young v. Biggers*, 917 F.2d 873, 877 (5th Cir. 1990); *Lynch v. Cannatella*, 810 F.2d 1363, 1369-70 (5th Cir. 1987). In an attempt to salvage their conspiracy claim, plaintiffs now contend that "[t]he investigation that took place *after* [Sorrells'] death was such a sham as to constitute no investigation at all and DPD's conduct in choosing to attack his public reputation rather than . . . interviewing civilian witnesses to his death, demonstrates a conspiracy among the officers, DPD, and Dallas." (Plf. Brief at 20) (emphasis added).

The Court need not decide whether an actionable conspiracy exists when police officers conceal important facts about a crime from its victims. *But see Vasquez v.*

Hernandez, 60 F.3d 325, 328 (7th Cir. 1995), *cert. denied*, 116 S. Ct. 1545 (1996) (holding that such a conspiracy is actionable under section 1985). This theory, raised for the first time in response to defendants' motion for summary judgment, is not alleged anywhere in the complaint. Accordingly, the conspiracy claim fails as a matter of law. *See Romero v. Alexander Chemical Employee Health Care Plan*, 1999 WL 498638 at *5 n.4 (N.D. Ill. July 2, 1999) (plaintiff may not raise issue for first time in response to summary judgment motion); *Nelson v. United States*, 1994 WL 247214 at *5 (E.D. Mich. Mar. 30, 1994) (defense waived when asserted in response to motion for summary judgment); *Ovitz v. Jefferies & Co., Inc.*, 102 F.R.D. 242, 243 (N.D. Ill. 1984) (response to motion for summary judgment not sufficient to put theory of recovery in issue).

E.

Plaintiffs generally allege violations of their due process and equal protection rights. (Plf. Compl. ¶¶ 4.03-4.04). Defendants contend that these claims are duplicative of other claims raised in the pleadings and should be dismissed for that reason. Plaintiffs wholly fail to address this argument in their response.[9] Accordingly, defendants are entitled to summary judgment.

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[9] The closest plaintiffs come to articulating a due process claim is their argument that Sorrells was not provided adequate medical care as a pretrial detainee. (Plf. Response at 19). Although such a claim may arise under the due process clause, it is properly analyzed under the "deliberate indifference" standard of the Eighth Amendment. *See Hare*, 74 F.3d at 649. The Court has previously determined that defendants were not deliberately indifferent to Sorrells' medical needs.

Plaintiffs' equal protection argument is also flawed. In order to establish an equal protection violation, plaintiffs must show that: (1) a state actor intentionally discriminated against Sorrells because of his membership in a protected class; (2) defendants were motivated by animus or ill-will; and (3) no rational basis existed for the disparate treatment. *See Village of Willowbrook v. Olech*, 528 U.S. 562, ___, 120 S. Ct. 1073, 1074-75, 145 L.Ed.2d 1060 (2000). Here, plaintiffs fail to

F.

The individual defendants also seek summary judgment on their qualified immunity defense. Police officers are entitled to qualified immunity if their conduct does not "violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Gutierrez*, 139 F.3d at 455, *citing Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). The Supreme Court has clarified the analytical structure under which a claim of qualified immunity should be addressed. *Siegert v. Gilley*, 500 U.S. 226, 231-33, 111 S.Ct. 1789, 1793, 114 L.Ed.2d 277 (1991). First, the court must determine whether the plaintiff has alleged the deprivation of an actual constitutional right. *Wilson v. Layne*, 526 U.S. 603, 119 S. Ct. 1692, 1697, 143 L.Ed.2d 818 (1999); *Siegert*, 111 S.Ct. at 1793. If the plaintiff alleges a constitutional deprivation, the court must then decide whether that right was clearly established if "the contours of that right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987). The second prong of this inquiry necessarily depends on the unique circumstances of each case. *Id.* However, the subjective intent of the police officer is irrelevant. *Id.*

The Court has previously determined that plaintiffs have alleged an excessive force claim against Sergeant Griffis, Corporal Cutrona, and Officer Readdy. There is no question that this is a "clearly established" constitutional right. *See Gutierrez*, 139 F.3d at 446, *citing Tennessee v. Garner*, 471 U.S. 1, 11, 105 S. Ct. 1694, 1701, 85 L.Ed.2 1 (1985) (use of deadly force violates Fourteenth Amendment

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satisfy any element of this test. There is absolutely no evidence that Sorrells belonged to a protected class, that he was treated differently than others similarly situated, or that defendants were motivated by animus or ill-will towards him.

unless officer has probable cause to believe that suspect poses threat of serious physical harm). Thus, the only question is whether the conduct of these officers was objectively unreasonable under the circumstances.

As noted by the Court in an earlier opinion, "the elements of plaintiffs' excessive force claim coincide in large part with the elements of defendants' qualified immunity defense." *Sorrells*, 192 F.R.D. at 209, *citing Heitschmidt v. City of Houston*, 161 F.3d 834, 839 (5th Cir. 1998). An essential element in both is whether defendants' actions were objectively unreasonable under the circumstances. *See Anderson*, 107 S. Ct. at 3038-39 (qualified immunity); *Johnson v. Morel*, 876 F.2d 477, 480 (4th Cir. 1989)(excessive force). There are simply too many disputed facts to permit resolution of this issue by way of summary judgment. That is not to say defendants are not entitled to qualified immunity. The issue will have to be resolved at trial. *See Roberts v. Marino*, 656 F.2d 1112, 1114 (5th Cir. 1981) (jury required when evidence amounts to "outright swearing match" between parties).

V.

The City of Dallas argues that plaintiffs have failed to establish any basis for municipal liability under 42 U.S.C. § 1983. Specifically, the City maintains that plaintiffs have failed to identify an official policy or custom which resulted in a constitutional injury.

A.

A municipality is not liable for the constitutional torts of its employees under the theory of *respondeat superior*. *Monell v. Department of Social Services of New York*, 436 U.S. 558, 690-94, 98 S. Ct. 2018, 2035-37, 56 L.Ed.2d 611 (1978); *Benavides v. County of Wilson*, 955 F.2d 968, 972 (5th Cir.), *cert. denied*, 113 S. Ct. 79 (1992). However, liability may be imposed under 42 U.S.C. § 1983 where an official policy, custom, or practice results in the deprivation

of a federally protected right. *Monell*, 98 S. Ct. at 2037-38. A plaintiff must show that: (1) the policy was inadequate; (2) the policymakers were deliberately indifferent to the constitutional rights of its citizens; and (3) the policy directly caused the injury. *City of Canton v. Harris*, 489 U.S. 378, 390-92, 109 S. Ct. 1197, 1205-06, 103 L.Ed.2d 412 (1989); *Benavides*, 955 F.2d at 972. In cases where the course of action was deliberately chosen by a decision maker with final authority to establish municipal policy, a single act is sufficient to give rise to a civil rights violation. *See Pembaur v. City of Cincinnati*, 475 U.S, 469, 480-81, 106 S. Ct. 1292, 1299, 89 L.Ed.2d 452 (1986).

A different standard applies where the challenged conduct relates to informal policies or a custom of behavior among municipal employees. In such cases, a single constitutional violation is not actionable under section 1983. *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 820-24, 105 S. Ct. 2427, 2434-36, 85 L.Ed.2d 791 (1985). A plaintiff must establish "a pattern of similar incidents in which citizens were injured or endangered by intentional or negligent [misconduct] or that serious incompetence or misbehavior was general or widespread . . ." *Languirand v. Hayden*, 717 F.2d 220, 227-28 (5th Cir. 1983), *cert. denied*, 104 S. Ct. 2656 (1984). The critical inquiry is whether the growing body of official policymaker had actual or constructive knowledge of persistent and widespread violations of constitutional rights. *See Bennett v. City of Slidell*, 728 F.2d 762, 768 (5th Cir. 1984), *cert. denied*, 105 S. Ct. 3476 (1985).

B.

Plaintiffs allege that the City of Dallas maintains a number of unconstitutional policies which lead to the death of Shane G. Sorrells. These include: (1) allowing the use of deadly force on non-threatening suspects who do not pose a flight risk; (2) sanctioning the use of deadly force against mentally impaired suspects who present no threat of

immediate physical harm; (3) allowing suspects to be restrained in a prone position following the use of force; (4) failing to require supervisors to monitor suspects placed in such a position; (5) condoning the failure of police officers and emergency medical personnel to intervene and render aid following the improper use of force; (6) failing to adequately train police officers and paramedics; and (7) failing to investigate incidents involving the use of deadly force or discipline responsible parties. (Plf. Brief at 22).

Not surprisingly, plaintiffs do not identify any formal policy which they allege to be unconstitutional on these grounds. Instead, plaintiffs argue that the actions of police and fire officials *following this incident* create a fact issue as to actual City policy. Plaintiffs cite an investigation conducted by the Internal Affairs Division of the Dallas Police Department wherein investigators determined that only Corporal Cutrona and Sergeant Griffis violated departmental policies.[10] (Plf. App. at 500, 523-44). Deputy Chief J.C. Martinez and Chief Terrell Bolton rejected the findings as to Sergeant Griffis (*Id.* 558). As a result, only Corporal Cutrona was disciplined. [11] (*Id.* 554-55). Plaintiffs further note that the Dallas Fire Department did not investigate the conduct of their paramedics. According to plaintiffs, the failure to conduct an adequate investigate or discipline the responsible parties suggests that the City tacitly approved of the conduct at issue in this case. (Plf. Brief at 23-24).

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[10] The Internal Affairs investigator concluded that Corporal Cutrona "used unnecessary or inappropriate force" and that Sergeant Griffis "failed to appropriately engage in and control a police incident under this supervision." (Plf. App. at 500, 532-36).

[11] Corporal Cutrona was suspended without pay for one day. (Plf. App. at 554-55).

This circular argument obscures the fact that plaintiffs seek to impose liability on the City for actions taken by individual police officers and paramedics on the scene. Plaintiffs present no evidence of "a pattern of similar incidents" involving the use of deadly force on mentally impaired suspects or the failure to render appropriate medical care after such force is used. The single, isolated incident involving Sorrells is insufficient to show that an official policy or custom existed. As the Supreme Court has stated:

> Proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell*, unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker . . . *But where the policy relied upon is not itself unconstitutional*, considerably more proof than the single incident will be necessary *in every case* to establish both the requisite fault on the part of the municipality, and the casual connection between the "policy" and the constitutional deprivation.

Tuttle, 105 S.Ct. at 2436 (emphasis added). Such is the case here. One incident of excessive force cannot sustain the interference that the City sanctioned or was indifferent to such constitutional abuses. *See Campbell v. City of San Antonio*, 43 F.3d 973, 977 (5th Cir. 1995) (single incident insufficient to establish custom); *Fraire v. City of Arlington*, 957 F.2d 1268, 1278 (5th Cir.), *cert. denied*, 113 S. Ct. 462 (1992) (custom or policy requires pattern of similar incidents). Plaintiffs cannot bootstrap liability against the

City in this fashion. Summary judgment is proper as to this claim.[12]

VI.

Plaintiffs allege that Dallas Police Chief Bennie Click and Dallas Fire Chiefs Roland Gamez and Joseph Vasquez "adopted, approved, ratified, and silently acquiesced" in the policies followed by the police officers and paramedics who encountered Shane Sorrells. (Plf. Compl. ¶¶ 4.08-4.17 & 4.18-4.27). This claims fails for two reasons. First, there is no evidence that the department chiefs personally participated in acts that caused a constitutional deprivation. *See Jett v. Dallas Independent School District,* 491 U.S. 701, 736, 109 S. Ct. 2702, 2723, 105 L.Ed.2d 598 (1989); *Thompson v. Steele*, 709 F.2d 381, 382 (5th Cir.), *cert. denied,* 104 S. Ct. 248 (1983) (personal involvement is an essential element in civil rights cause of action). Second, plaintiffs have not established the existence of an unconstitutional policy or custom which led to Sorrells'

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[12] Plaintiffs protest that they were precluded from taking any discovery on certain aspects of their municipal liability claim by virtue of a court order dated February 25, 2000. (Plf. Brief at 24; Hamilton Aff. ¶ 2.1). This argument is rather disingenuous. In its order granting in part and denying in part plaintiffs' motion to lift a discovery stay, the Court wrote:

> [M]uch of the discovery requested by plaintiffs is directed to the City of Dallas and goes to the issue of municipal liability. A municipality is not entitled to qualified immunity. [Citations omitted]. Therefore, *plaintiffs should be allowed to conduct discovery in order to pursue their claims against this defendant.* [Citations omitted].

Sorrells, 192 F.R.D. at 210 (emphasis added). The Court allowed plaintiffs to conduct full discovery on all aspects of their municipal liability claim. Plaintiffs have no one but themselves to blame for failing to take advantage of that opportunity.

death. Accordingly, these defendants are entitled to summary judgment.[13]

VII.

Finally, defendants seek summary judgment on plaintiffs' state law claims for assault, battery, false imprisonment, intentional infliction of emotional distress, and negligence. The City contends that these claims are barred by the doctrine of sovereign immunity. The individual defendants claim official immunity.

A.

Under Texas law, a municipality is not liable for the torts of its agents unless there is a constitutional or statutory waiver of immunity. *Mt. Pleasant Independent School District v. Estate of Lindburg*, 766 S.W.2d 208, 211 (Tex. 1989). The Texas Tort Claims Act waives sovereign immunity if certain conditions are met. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.102, *et seq.* (Vernon 1986). The statute provides for a waiver of immunity in cases of "personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant

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[13] Even if plaintiffs were to establish the existence of an unconstitutional policy, they have not shown that the department chiefs are "policymakers." The Dallas City Charter provides that "all powers conferred on the city shall be exercised by a city council . . . unless otherwise provided by law." DALLAS CITY CHARTER, Ch. III, § 1 (1993). The council is required to appoint a city manager who acts as chief administrative and executive officer. *Id.*, Ci. VI, §§ 1-2. Department chiefs are appointed by and directly responsible to the city manager. *Id.*, Ch. VI, § 2-(3). The police chief has ultimate responsibility for the "administration, command and external relations of the police department." (Plf. App. at 7). However, the city council and city manager are authorized to inquire into and investigate the conduct of any city department. DALLAS CITY CHARTER, Ch. III, § 18. Absent evidence to the contrary, the Court must assume that policymaking authority resides with the City's governing body. *See Atkins v. City of Carrollton*, 1997 WL 160297 at *4 (N.D. Tex. Mar. 27, 1997)(Fitzwater, J.); *Lowery v. Redington*, 1997 WL 10018 at *10 (N.D. Tex. Jan. 6, 1997) (Solis, J.).

according to Texas law." *Id.* § 101.021; *Evans v. City of Marlin,* 986 F.2d 104, 108-09 (5th Cir. 1983). However, immunity is not waived for "assault, batter, false imprisonment, or any other intentional tort." TEX. CIV. PRAC. & REM. CODE ANN. § 101.057; *Gillum v. City of Kerrville*, 3 F.3d 117, 125 (5th Cir. 1993), *cert. denied,* 114 S. Ct. 881 (1994).

It is clear that the City is not liable for the intentional conduct of its employees. Although the negligent conduct of police officers and paramedics may subject the City to liability under the Texas Tort Claims Act, plaintiffs have failed to adduce any evidence to support such a claim. In fact, they do not even brief the issue in their response to defendants' motion for summary judgment. The City is entitled to summary judgment on its sovereign immunity defense.

B.

Municipal employees are immune from suit for discretionary acts performed in good faith while acting within the scope of their authority. *City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex. 1994). This legal analysis is the same under both federal and state law. *Cantu v. Rocha*, 77 F.3d 795, 808 (5th Cir. 1996). The issue is "whether a reasonable official could have believed his or her conduct to be lawful in light of clearly established law and the information possessed by the official at the time the conduct occurred." *Chambers*, 883 S.W.2d at 656, *quoting Swint v. City of Wadley*, 5 F.3d 1435, 1441-42 (5th Cir. 1993).

The Court has already determined that genuine issues of material fact preclude summary judgment in favor of Sergeant Griffis, Corporal Cutrona, and Officer Readdy on their federal immunity defenses. These same fact issues also preclude summary judgment on the grounds of official immunity. However, there is no evidence that any of the

other defendants acted in an objectively unreasonable manner. Therefore, summary judgment is proper as to those defendants.

RECOMMENDATION

Defendants' motion for summary judgment should be granted in part and denied in part. Plaintiffs should be allowed to prosecute their excessive force claim, failure to protect claim, and plain state law claims against Sergeant Stanley Griffis, Corporal Joseph Cutrona, and Officer William Readdy. To that extent, defendants' motion for summary judgment should be granted in all other respects.

DATED: December 15, 2000.

/s/ Jeff Kaplan
JEFF KAPLAN
UNITED STATES MAGISTRATE JUDGE

SUPPLEMENTAL APPENDIX EXHIBIT "B"

ORDER

After making an independent review of the pleadings, files and records in this case, and the Findings and Recommendations of the United States Magistrate Judge, I am of the opinion that the Findings and Conclusions of the Magistrate Judge are correct, except as described below.

The Court finds that the magistrate misstated the standard with respect to the use of excessive force in the Fifth Circuit. The standard the Fifth Circuit has established is a three-part test. A plaintiff must show that: (1) he suffered a significant injury; (2) resulting from force that was clearly excessive to the need for force; and (3) the force used was objectively unreasonable. *Goodson v. City of Corpus Christi*, 202 F.3d 730, 740 (5th Cir. 2000).

The magistrate's reliance on *Gutierrez v. City of San Antonio,* 139 F.3d 441, 445 (5th Cir. 1998) is also misplaced since that case was specifically limited to situations involving a drug induced defendant, who had been hog-tied. The Defendants' reliance on *Wagner v. Bay City*, 227 F.3d 316 (5th Cir. 2000), is also inapplicable, however, since *Wagner* involved an attempt by the officers to maintain control of a combative person resisting arrest. Here, a fact issue exists as to the amount of force used by the officers and the necessity of the force used while Sorrells was not offering resistance, according to the witnesses.

The use of the wrong standard and the reliance on *Gutierrez*, however, do not affect that outcome of this Court's decision.

Accordingly, the Findings and Recommendation of the magistrate court are hereby adopted as the Findings and Conclusions of the Court. Defendants' Objections are hereby **DENIED** and Plaintiffs' Objections are hereby **DENIED.**

So Ordered.

Signed this 30th day of March, 2001.

/s/ Jorge A. Solis
Jorge Solis
United States District Judge